IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
INSTITUTIONAL LIABILITY LIST

Not Restricted

S ECI 2019 05068

JADE VILLAN — Plaintiff

v

STATE OF VICTORIA — Defendant

JUDGE:	Keogh J
WHERE HELD:	Melbourne
DATE OF HEARING:	3 May 2021
DATE OF RULING:	18 June 2021
CASE MAY BE CITED AS:	Villan v State of Victoria
MEDIUM NEUTRAL CITATION:	[2021] VSC 354

INSTITUTIONAL LIABILITY — Evidence — Allegations of historical sexual abuse of a child — Allegations denied — Alleged perpetrator to be called as a witness by defendant — Plaintiff intends to report allegations to the police but has not yet done so — Privilege against self-incrimination — Whether in the interests of justice to require witness to give evidence — Relevant considerations — *Evidence Act 2008* (Vic), s 128(4)(b), (5) — *Lucciano v The Queen* [2021] VSCA 12 — *R v Lodhi* (2006) 199 FLR 328 — *X7 v Australian Crime Commission* (2013) 248 CLR 92.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	C J Winneke QC and D Seeman	Maurice Blackburn
For the Defendant	M Britbart QC and B House	Thomson Geer
For Witness	A Beech	Tony Hargreaves & Partners

HIS HONOUR:

1 The plaintiff alleges that in about 1986 and 1987, when he was a student in a state high school operated by the defendant, he was sexually assaulted on a number of occasions by a person referred to in the proceeding by the pseudonym EFG ('the abuse'). The plaintiff brings this proceeding alleging there was negligence by an officer or officers of the defendant which was a cause of the abuse and consequent injury suffered by him, and that the defendant is vicariously liable for the acts perpetrated by EFG.

2 The defendant denies the abuse, and intends to call EFG as a witness in order to meet the case made by the plaintiff.

3 The trial commenced in April 2021 before a jury. On the morning of the fourth day of trial the defendant applied for discharge of the jury without verdict on the basis that it was necessary for EFG to obtain independent legal advice about the operation of s 128 of the *Evidence Act 2008* (Vic) ('*Evidence Act*') and the potential consequences for him of giving evidence in the trial. I granted the defendant's application and adjourned the matter to 3 May 2021 to hear submissions about the operation of s 128 and whether it was in the interests of justice to require that EFG give evidence.

4 Counsel was granted leave to appear for EFG on 3 May 2021. I was greatly assisted by the submissions made on his behalf.

Background and procedural history

5 The plaintiff was about 13 or 14 years of age when he was allegedly abused. The abuse which is alleged is of a very serious nature and includes, amongst other things, that EFG anally penetrated the plaintiff with his penis.

6 This proceeding was commenced by the plaintiff in November 2019. In a defence filed in February 2020 the defendant pleaded that it did not admit the allegations of abuse.

7 In February 2021 the defendant amended its defence to deny the allegations of abuse and indicated an intention to call EFG to give evidence.

8 A jury was empanelled on the afternoon of 19 April 2021, and the trial proceeded over the following two days. On the afternoon of the third day of trial the jury asked a number of questions, including:

> Has there been a criminal case against EFG?

The jury was told the answer to that question was no. The plaintiff was asked questions about this issue, and said that he had not made a complaint to police about the conduct of EFG, but in the light of advice he had received from his lawyers that he could report the allegations to police at any stage, he had decided that he would do so.

9 The following morning counsel for the defendant informed the Court that in light of the evidence given by the plaintiff, EFG wished to obtain independent legal advice about whether he should give evidence in the trial. Counsel for the defendant applied for the jury to be discharged, and for the proceeding to be adjourned to allow EFG to obtain advice. I granted the defendant's application.

10 The proceeding was listed on 3 May 2021, after EFG had obtained legal advice, to determine whether, and in what circumstances, he would give evidence at trial. The position taken by EFG was that he was unwilling to give evidence, and opposed any application that he be required to do so.

Statutory provision and authorities

11 The relevant statutory provision is s 128 of the *Evidence Act*, which abrogates the common law privilege against self-incrimination:

> **128 Privilege in respect of self-incrimination in other proceedings**
>
> (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness—
>
> (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
>
> (b) is liable to a civil penalty.
>
> (2) The court must determine whether or not there are reasonable grounds for the objection.
>
> (3) Subject to subsection (4), if the court determines that there are reasonable grounds for the objection, the court is not to require the witness to give the

evidence, and is to inform the witness—

(a) that the witness need not give the evidence unless required by the court to do so under subsection (4); and

(b) that the court will give a certificate under this section if—

(i) the witness willingly gives the evidence without being required to do so under subsection (4); or

(ii) the witness gives the evidence after being required to do so under subsection (4); and

(c) of the effect of such a certificate.

(4) The court may require the witness to give the evidence if the court is satisfied that—

(a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and

(b) the interests of justice require that the witness give the evidence.

(5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.

…

(7) In any proceeding in a Victorian court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence—

(a) evidence given by a person in respect of which a certificate under this section has been given; and

(b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence—

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

(8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

…

12 It is not controversial that EFG objects to giving evidence on the ground that it may tend to prove he has committed an offence, that there are reasonable grounds for the objection, and that he is unwilling to give evidence under the protection of a certificate given under s 128(5). No question arose as to the law of a foreign country.[1] The only issue requiring

determination at this stage is whether it is in the interests of justice to require EFG to give evidence in this proceeding.[2]

13 Section 128(4) provides a broadly worded and undefined discretionary power to require a witness to give evidence if the court is satisfied it is in the interests of justice to do so.[3]

14 The party seeking to have the witness compelled bears the onus of satisfying the court that the interests of justice require the evidence to be given. It is not sufficient that the evidence is relevant to the facts in issue in the proceeding.[4]

15 The effect of s 128 of the *Evidence Act* is to abrogate the common law privilege against self-incrimination.[5] The object of s 128 is to strike a balance between upholding an objection by a witness to giving evidence which may tend to prove they have committed an offence, and requiring the witness to give the evidence with the protection of a certificate under s 128(5).[6]

16 The balance struck by giving a certificate under s 128(5) does not provide the witness with complete protection.[7] In *X7 v Australian Crime Commission*,[8] Hayne and Bell JJ described the effect of compulsory pre-trial examination on the criminal process:

> Requiring the accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge (whatever answer is given). Even if the answer cannot be used in *any* way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case. And what would otherwise be a wholly accusatorial process, in which the accused may choose to offer no account of events, but simply test the sufficiency of the prosecution evidence, is radically altered. An alteration of that kind is not made by a statute cast in general terms. If an alteration of that kind is to be made, it must be made by express words or necessary intendment.
>
> ...
>
> Even if the answers given at a compulsory examination are kept secret, and therefore

---

1 *Evidence Act 2008* (Vic) s 128(4)(a).
2 Ibid s 128(4)(b).
3 *Rich v Attorney General of New South Wales* [2013] NSWCA 419, 13-15 [18]–[22] (Leeming JA, Bathurst CJ and Beazley P agreeing) ('*Rich*').
4 *Gedeon v The Queen* (2013) 237 A Crim R 326, 377–378 [285]–[286] (Bathurst CJ) ('*Gedeon*').
5 *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436, 444 [82] (Giles JA, Spigelman CJ and McColl JA agreeing) ('*Ross*'); *Chong and Another v CC Containers Pty Ltd* (2015) 49 VR 402, 470 [231] (Redlich, Santamaria and Kyrou JJA) ('*Chong*').
6 *Chong* (n 5) 471 [236], citing *Cornwell v The Queen* (2007) 231 CLR 260, 312 [148] (Kirby J).
7 *R v Lodhi* (2006) 199 FLR 328, 340–341 [55] (Whealy J); *Ross* (n 5) 450–451 [99]; *Gedeon* (n 4) 378 [292].
8 (2013) 248 (CLR) 92 ('*X7*'). See also *Ross* (n 5) 450–451 [99]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 229–230 [54] (French CJ).

> cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according *only* to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge.[9]

17 Even if the possibility of prejudice to the witness is established, it may still be in the interests of justice to require that they give evidence.[10] Whether or not that is so will depend on all the circumstances of the case. A relevant consideration is whether criminal proceedings against the witness are pending or likely.[11]

18 In *Lucciano v The Queen* ('*Lucciano*')[12] the Court of Appeal considered the prejudice experienced by the accused in a criminal prosecution as a consequence of having given evidence as defendant in a civil trial dealing with the same subject matter. The circumstances in *Lucciano* are different to those in this proceeding in a number of material respects. First, the plaintiff/complainant had already reported allegations of historical sexual abuse and made a statement to police before the trial in the civil proceeding. Second, the applicant in *Lucciano* was the defendant in the earlier civil proceeding, and gave evidence in the civil proceeding without the protection of a certificate under s 128(5). Third, the evidence given by the applicant in the civil proceeding was deployed against him in the criminal trial. However, some aspects of the prejudice suffered by the applicant in *Lucciano* identified by the Court of Appeal are relevant in this case. The informant in *Lucciano* used the civil trial transcript as part of the criminal investigation. While there is a direct and derivative protection against the use of evidence given by the witness in s 128(7) of the *Evidence Act*, the possibility exists that an informant investigating allegations against EFG would be made

---

9 *X7* (n 8) 127, 142–143 [71], [124] (Hayne and Bell JJ).
10 *Rich* (n 3) 23–25 [38]–[42].
11 *R v Simmons (No 6)* (2015) 250 A Crim R 65 (Hamill J).
12 [2021] VSCA 12 (McLeish, Niall and T Forrest JJA) ('*Lucciano*').

aware of the position he adopted in evidence in the civil trial, and would have the advantage of that information when undertaking the criminal investigation. The Court in *Lucciano* recognised the possibility that the complainant, who had sat through the civil trial and saw the evidence relied upon by the applicant, could use this knowledge to craft her evidence in the criminal trial.[13] There was a real risk of prejudice in defence of the criminal trial because the circumstances relevant to both proceedings were substantially identical, and the civil trial was a dress rehearsal for the later criminal trial.[14]

Submissions

Witness - EFG

19 There are four main reasons why the interests of justice do not require that EFG be compelled to give evidence. First, there is evidence EFG will be subject to at least an investigation, if not criminal charges, for very serious offences, the subject of which is identical to the allegations before the Court in this proceeding. The plaintiff's evidence is a sufficient basis to find that a complaint to police is coming, if not imminent. Second, in a case where there is very little substantial evidence, other than the account of the plaintiff, any evidence given by EFG will assume prominence and will be significant in any prosecution of him. The evidence may be used, intentionally or inadvertently, by the complainant and other witnesses, investigators and the prosecution to understand and respond to the forensic position which EFG would be forced to adopt by giving evidence. Third, EFG would no doubt be cross-examined as to his credit and reliability, which would further expose him in an unjust sense. Fourth, if it is relevant, any further steps such as a suppression order would not protect EFG from prejudice.

20 A certificate given under s 128(5) of the *Evidence Act* will not protect EFG from prejudice in a criminal proceeding arising from being required to give evidence in this proceeding. A consequence of EFG being required to give evidence is that he would be forced down a particular forensic path which would bind him in a subsequent criminal case and may have the effect of requiring that he prove matters which he should not have to prove.

---

13 Ibid [34].

14 *Lucciano* (n 12) [24].

Defendant

21 The main argument between the parties, to which much of the evidence at trial will be directed, is whether or not the abuse occurred. The defendant cannot defend the case brought by the plaintiff without the evidence of EFG. Because of the matters that will be traversed at trial, and the impact on any future criminal proceedings, it is not in the interests of justice that EFG be required to give evidence.

Plaintiff

22 The plaintiff does not intend calling EFG to give evidence at trial, and is not the party with the obligation of satisfying the court that it is in the interests of justice to require that he give evidence. However, the following matters are relevant to that issue. First, EFG is an essential witness whose evidence forms the basis of the defendant's defence. Second, EFG may never be prosecuted for offences based on the plaintiff's allegations. Third, EFG is not a party to this proceeding, and will have the protection of a certificate given under s 128(5). Fourth, if EFG is not required to give evidence the defendant will have good grounds to apply for a stay of the proceeding, which will prejudice the plaintiff.

Consideration

23 It is likely, if EFG is not required to give evidence, that the only direct evidence at trial about whether the abuse occurred will be given by the plaintiff, and on that critical issue the defence will be limited to an attack on his credit and reliability. I accept that if EFG is not required to give evidence the defendant cannot fairly defend the case brought by the plaintiff.

24 Whether the abuse occurred is the most significant fact in issue in this proceeding and of any potential prosecution of EFG. All of the evidence which EFG would give, if he is called as a witness at trial, is likely to be relevant, directly or indirectly, to that issue. The critical fact in issue in both proceedings is identical, and the evidence which would be given by EFG is directed to that issue.

25 The importance of his evidence at trial is likely to mean that EFG would be subjected to rigorous cross-examination challenging his credit and the reliability of his evidence.

26 There is no pending criminal proceeding against EFG. However, I accept the plaintiff's evidence that he will report the allegations he makes against EFG to police. It is likely the

allegations will be investigated by police. I conclude that as a consequence there is a real prospect of EFG being charged with very serious offences and of being exposed to a significant period of imprisonment if found guilty.

27 Because he has not previously been required to answer the plaintiff's allegations, there is no published record of the response EFG would give. The accusatorial judicial process in relation to the prosecution of EFG on charges based on the allegations made by the plaintiff would be fundamentally altered by requiring that he give evidence over his valid objection. The plaintiff, other witnesses and police investigators would be informed of the case he made in response to the allegations of criminal conduct, and of issues in relation to his credibility and reliability, which would inevitably give them forewarning of the strengths and weaknesses of his evidence, and the opportunity to respond. Further, evidence given by EFG at trial will determine or restrict forensic choices open to him in any criminal prosecution brought against him. In that sense, EFG would not be free at any criminal trial to put the prosecution to its proof on every fact or matter, and may be forced to call evidence himself.

28 The defendant has foreshadowed that if EFG is not required by me to give evidence it will apply for a stay of the plaintiff's proceeding. Counsel for the plaintiff acknowledged such an application is likely to be successful, and relied on the prejudice the plaintiff would suffer as a consequence. However, while a stay of the proceeding may be lengthy, it will only be required until any criminal investigation or prosecution is complete. The plaintiff will not be permanently deprived of the right to prosecute his cause of action against the defendant.

29 The above factors do not all support the same conclusion. EFG is an essential witness to the defendant's defence of the claim brought by the plaintiff. If he is not required to give evidence there will be an indeterminate stay of the proceeding, and the plaintiff will suffer irremediable prejudice as a result. However, the allegations made by the plaintiff against EFG will now be reported to, and are likely to be investigated by police. The critical fact in issue in this trial and in any potential criminal prosecution is identical. EFG's evidence would be central to the determination of that issue in this proceeding. I conclude that the departure from the accusatorial system of criminal justice which would result means that it is not in the interests of justice to require that EFG give evidence at a trial in this proceeding

until any criminal investigation and resulting prosecution of EFG has run its course.

30 It is tragic that, having commenced his evidence before a jury, the plaintiff will now be denied a trial for an indefinite period. However, the integrity of the system of criminal justice must be preserved. Steps should be taken in other cases with similar circumstances to identify and resolve such issues well prior to trial.

Conclusion

31 Balancing all relevant considerations I have concluded that it is not in the interests of justice that EFG be required to give evidence at a trial in this proceeding when it is likely the allegations against him by the plaintiff will be the subject of a criminal investigation. I will hear from the parties as to the orders which should now be made, including as to a stay of the proceeding and costs.